

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Petition for Declaratory Ruling Regarding Fees)
Charged by Clark County, Nevada for Small)
Wireless Facilities)
_____ /

WT Docket No. 19-230

COMMENTS OF EXTENET SYSTEMS, INC.

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I. INTRODUCTION

Pursuant to the Federal Communication Commission's ("Commission") Wireless Telecommunications Bureau's Public Notice seeking comments¹ in the above-referenced docket ExteNet Systems, Inc. ("ExteNet") respectfully submits comments in support of Verizon's Petition for a Declaratory Ruling ("Petition") and requests that the Commission issue a Declaratory Ruling clarifying its previous orders regarding just and reasonable fees for access and attachments.

ExteNet designs, builds, owns, manages and operates indoor and outdoor "neutral host" distributed network systems to help meet the intense demand for improved mobile and wireless broadband coverage and capacity in key strategic markets across the United States. Utilizing distributed antenna systems, remote radio heads, small cells, Wi-Fi and distributed core soft-switching technologies, ExteNet enables wireless service providers, enterprises and venues to better serve their subscribers, customers, workers, residents, tenants and communities

ExteNet's distributed network facilities consist of: (a) fiber optic cable; and (b) small antennas and supporting equipment that are either attached to municipally owned facilities, utility poles and other structures in the public rights-of-way or suspended on cables strung between municipally owned facilities, utility poles or wireless support structures. Wireless service providers pay ExteNet to use its distributed network facilities to assist them in providing wireless telecommunications services to retail consumers.

ExteNet's distributed network facilities are typically installed in the public rights-of-way. ExteNet enters into agreements with local municipalities for both access to the municipal rights-of-way and for access to install ExteNet's facilities on various municipally owned facilities. Most

¹ *Wireless Telecommunications Bureau Seeks Comment on Verizon's Petition for Declaratory Ruling Regarding Fees Charged by Clark County, Nevada for Small Wireless Facilities*, WT 19-230, DA 19-823, Aug. 26, 2019.

municipalities charge fees for such access. Unfortunately, exactly a year after the issuance of the *TRO*² and over nine months after it became effective, numerous municipalities are ignoring the Commission’s determinations as to what are reasonable fees that would comply with the provisions of 47 U.S.C. § 253 and 47 U.S.C. § 332(c)(7).

As discussed below, it is not just Clark County, Nevada that continues to disregard the Commission’s requirement that compensation be limited to a “reasonable approximation of objectively reasonable costs and be non-discriminatory” as applied “to all state and local government fees paid in connection with a provider’s use of the ROW to deploy Small Wireless Facilities including, but not limited to, fees for access to the ROW itself, and fees for the attachment to or use of property within the ROW owned or controlled by the government (*e.g.*, street lights, traffic lights, utility poles, and other infrastructure within the ROW suitable for the placement of Small Wireless Facilities).”³ While Verizon’s Petition is directed at the fees charged by Clark County, Nevada for the placement of Small Wireless Facilities (“small cells”), blatant disregard for the standards established in the Commission’s *TRO* is prevalent throughout the nation and should be addressed by the Commission in a Declaratory Ruling.

II. STANDARD FOR PRESUMABLY JUST AND REASONABLE FEES

Sections 253(a) and 332(c)(7)(B)(i)(II) of the Telecommunications Act⁴ provide that municipal regulations are preempted if they prohibit or have the effect of prohibiting the provision of a telecommunications service or small wireless service. In the *TRO*, the Commission clarified

² *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT 17-79, WC 17-84, FCC 18-133, Sept. 26, 2018. (“*TRO*”). The *TRO* became effective as of January 14, 2019. 83 Fed. Reg. 51,867 (2019).

³ *Id.* at ¶ 69.

⁴ 47 U.S.C. §253(a) and 332(c)(7)(B)(i)(II).

that an effective prohibition occurs where a municipal legal requirement “materially limits or inhibits any competitor’s or potential competitor’s ability to compete in a fair and balanced legal and regulatory environment.”⁵ The Commission rejected the rulings of those Federal Circuit Courts that have “held that a denial of a wireless siting application will ‘prohibit or have the effect of prohibiting’ the provision of small wireless service under Section 332(c)(7)(B)(i)(II) only if the provider can establish that it has a significant gap in service coverage in the area and a lack of feasible alternative locations for siting facilities.”⁶ The “effective prohibition” test now applies not only when a provider is attempting to fill a gap in coverage, but also when the provider proposes to densify its existing wireless network, introduce new services, or otherwise improve service capabilities.⁷ Effectively, all ROW regulations and determinations as applied to installation of Small Wireless Facilities should now be scrutinized under the new “effective prohibition” test.

Within this parameter, the Commission also applied the “effective prohibition” test to rates and fees charged by municipalities. The *TRO* establishes a threshold rate of “\$270 per [small cell] per year for all recurring fees, including any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW,”⁸ which is considered presumptively just and reasonable. The Commission did however find that exceptions may occur, where such fees are “(1) a reasonable approximation of costs, (2) those costs themselves are reasonable, and (3) are non-discriminatory.”⁹ To comply with such an exception, a municipality would have to engage in

⁵ *TRO* at ¶¶ 35-37.

⁶ *Id.* at ¶ 35

⁷ *Id.* at ¶ 37.

⁸ *Id.* at ¶ 79.

⁹ *Id.* at ¶ 80.

a cost-study conducted by an independent auditor/accountant (similar to that which a rate-of-return utility would have to file) to sufficiently justify the rates the municipality believes are reasonable approximations of their reasonable costs. ExteNet respectfully requests that the Commission elaborate on the standards required for a municipality to charge fees above the presumptively just and reasonable rate and adopt ExteNet's position on conducting an independent cost study.

III. EXAMPLES OF FEES THAT ARE NOT JUST AND REASONABLE

A. Clark County, Nevada

As summarized in Verizon's Petition, Clark County, Nevada's new Ordinance¹⁰ does not comply with the Commission's presumptively just and reasonable rate limitation. The fees are not based on reasonable approximations of reasonable costs incurred by Clark County "specifically related to and caused by the deployment" of small cells.¹¹ Thus, the costs should be deemed presumptively violative of the requirement of 47 U.S.C. § 253(c), requiring that such charges be "fair and reasonable" and, as interpreted in the Commission's *TRO*, "(1) a reasonable approximation of costs, [and] (2) those costs themselves are reasonable."¹²

Like Verizon, ExteNet is adversely affected by Clark County's ordinance. ExteNet has numerous small cells (inclusive of nodes, radios, and antennae) deployed in Clark County currently providing wireless service for different carriers supported by substantial amounts of fiber located in Clark County's public ROW. ExteNet pays Clark County more than several hundred thousand dollars per year for the privilege of placing these assets in the public rights-of-way and on the municipal infrastructure of Clark County. Like Verizon, ExteNet participated in the various

¹⁰ Clark County Code, Title 5, Chapter 5.02, *et seq.*

¹¹ *TRO* at ¶ 55.

¹² *Id.* at ¶ 80.

meetings with Clark County that developed the Ordinance, which was adopted over ExteNet's numerous objections that the Ordinance would violate the Commission's standards for what rate is just and reasonable following adoption of the *TRO*.

B. Excessive Fees Continue to be Charged Throughout the Nation

Municipalities throughout the country continue to demand that ExteNet pay outrageous fees for access to the public rights-of-way that are not limited to a reasonable approximation of objectively reasonable costs, even after the *TRO* became effective.¹³ ExteNet has myriad examples of municipalities charging exorbitant rates for access to the public rights-of-way that constitute economic barriers to entry in violation of 47 U.S.C. § 253(a) and the Commission's *TRO*, and are considerably above the threshold rate established by the Commission as just and reasonable. In each of the following examples -- a list that is by no means exhaustive -- the municipalities involved have not demonstrated that they have complied with the requirements for limited exceptions the Commission established in the *TRO* for exceeding the threshold just and reasonable rate of \$270 per small cell by demonstrating that the rates charged are reasonable approximations of reasonable costs.

i. Pole Attachment and ROW Access Fees

The District of Columbia ("District") continues to charge an annual attachment fee for placing small cells on District-owned streetlights that exceeds the Commission's limit. The District charges a sliding scale from \$1,500 per pole per year for between one and twenty-five poles to \$300.00 per pole per year for five hundred or more poles. Baltimore, Maryland has a similar sliding

¹³ See Comments of ExteNet Systems, Inc., *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT 17-79, WC 17-84, filed on June 15, 2017, for examples of egregious rates and fees prior to the issuance of the *TRO*.

scale starting at \$2,400 per pole per year and Philadelphia, Pennsylvania's starts at \$3,090.00 per pole per year. Clearly, a sliding scale discriminates against smaller providers who do not install small cells in the volume that results in the lowest per pole rate. A sliding scale also, by definition, does not reflect a reasonable approximation of costs on a per pole basis.

There are municipalities that continue to charge rates above the presumptively just and reasonable rate on an annual per pole basis. Orlando, Florida's Utility Commission insists on a rate of \$1,200 per small cell per year, while Walnut Creek, California charges \$2,000 per small cell per year, and Newark, California charges \$1,000 per small cell per year. Portland, Oregon charges \$1,250 per small cell annually based on a contractual rate it negotiated with AT&T that predated the *TRO*. Portland justifies this fee on the basis of "competitive neutrality."¹⁴

Numerous municipalities continue to levy an annual per pole attachment fee *and* charge additional fees based on gross revenue despite the fact that the Commission "agree[d] with courts that have recognized that gross revenue fees generally are not based on the costs associated with an entity's use of the ROW, and where that is the case, are preempted under Section 253(a)."¹⁵ In Massachusetts, certain municipalities continue to charge 5% of gross revenues plus an annual per pole fee. The per pole fee varies, with Boston and Somerville charging \$500 per pole per year while Brookline charges \$510 per pole per year, and each city additionally charges an annual 5% gross revenue fee. Canby, Oregon adopted an annual 7% gross revenue fee for use of small cell after the issuance of the *TRO*.

¹⁴ Some municipalities even charge ROW access fees for attachments to utility poles that are owned by third-parties, such as investor owned utilities. Revere, Massachusetts charges an annual attachment rate of \$750 per municipal owned pole and \$250 for poles owned by a third-party. *TRO* at ¶ 70.

¹⁵ *TRO* at ¶ 70.

ii. *ROW Fiber or Backhaul Fees*

The ability to propagate a signal from wireless switches and antennae to and from other wireless switches, antennae, the Internet and POTS is an essential functionality of a wireless telecommunications network. The Commission recognized this in the *TRO*, finding “that the same reasoning should apply to other state and local government fees such as ROW access fees or fees for the use of government property within the ROW.”¹⁶ However, in the *TRO* the Commission declined to recommend threshold fees for so called “fiber backhaul” typically placed in the public rights-of-way that would presumptively not be prohibited by 47 U.S.C. § 253 or 47 U.S.C. § 332(c)(7). In the absence of such a standard, such as the Commission established for pole attachments,¹⁷ some municipalities continue to charge egregious rates that are not just and reasonable and which are not reasonable approximations of reasonable costs incurred by the municipality.

ExteNet has been required to pay fees for access to the rights-of-way that are arbitrarily set or set based on perceived market conditions as opposed to a reasonable approximation of reasonable costs incurred by the municipality. For example, O’Fallon, Illinois insists on \$1,000 per month for the first mile of linear facilities in the ROW and \$0.16 per linear foot per month thereafter. This amounts to \$22,137.60 per year for a mere two miles of fiber, when small cell installations routinely require exponentially more miles of fiber. Gilbert, Arizona charges \$2.10 per foot on an annual basis. St. Louis, Missouri charges (i) \$2.18 per linear foot of conduit for underground transmission lines or conduit of four (4) inches in diameter or less; (ii) \$2.96 per linear foot of conduit for underground transmission lines or conduit of over four (4) inches in

¹⁶ *TRO* at ¶74.

¹⁷ *TRO* at ¶79.

diameter but less than eight (8) inches in diameter; (iii) \$4.42 per linear foot of conduit for underground transmission lines or conduit of eight (8) inches or more in diameter; and (iv) \$2.18 per linear foot of conduit for each inch in diameter or fraction thereof of aerial wire even though there is no evidence to suggest that it costs St. Louis more to manage larger conduit.

IV. PROPOSED RESOLUTION

In its Order Denying Abeyance in this proceeding, the Wireless Telecommunications Bureau stated that in the *TRO*, “the Commission noted that state and local fees and other charges associated with the deployment of wireless infrastructure can unlawfully prohibit the provision of service even in places *other than* where the fees are charged.”¹⁸ In the context used in the *TRO*¹⁹, the Commission believed that the impact on other geographic areas would result from a depletion of limited financial resources. While the Commission was correct, there is a further implication when a municipality charges rates that are not just and reasonable which is not discussed in the *TRO* – precedent. If ExteNet or other providers were to agree to an artificially high rate in one municipality for business or competitive purposes, other municipalities would point to that acquiescence as justification for their own artificially high rates. One small rural community in the Midwest with a population of under 30,000 has repeatedly claimed to ExteNet that it is the fastest growing municipality in the Midwest and therefore deserves rates equal to such cities as St. Louis, Chicago, or New York. Any declaratory ruling in this matter should set a precedent for other municipalities that attempt to charge such unreasonable rates for small cells and fiber backhaul.

The Commission must unambiguously declare that small cell and fiber backhaul fees that exceed the presumptively reasonable annual rate of \$270 and that are not based on a reasonable

¹⁸ *Re: Verizon Petition for Declaratory Ruling Regarding Fees Charged by Clark County, Nevada for Small Wireless Facilities*, WT 19-230, DA 19-927, Order, ¶ 3, Sept. 18, 2019

¹⁹ *TRO* at ¶¶ 11, 60-61.

approximation of its reasonable costs, as sufficiently established by a report of an independent auditor, are not just and reasonable and are illegal under the Communications Act. The Commission should prescribe in detail what an acceptable independent audit report must contain in order to justify fees higher than the limit contained in the *TRO*. Absent sufficient justification that complies with the standards established by the Commission, annual access and attachment fees must default to the \$270 rate limitation specified by the *TRO*.

In addition to addressing just and reasonable rates and fees, the Commission must create a “deemed granted” remedy for small cell applications in instances where the reviewing authority fails to act within the “shot clock” timelines. The Commission stopped short of creating this remedy in the *TRO*, but the record previously established in the *TRO* proceeding and now supplemented by the evidence offered in this proceeding of the blatant disregard for the Commission’s discussion of rates and fees in the *TRO* provide ample justification for creation of a “deemed granted” remedy at this time.

V. CONCLUSION

ExteNet supports Verizon’s Petition in this matter and respectfully requests that the Commission declare Clark County and any other municipality charging recurring fees for both Small Wireless Facilities and fiber backhaul that are not based on a reasonable approximation of its actual reasonable costs, as sufficiently established by a report of an independent auditor according to clear standards established by the Commission, may not charge recurring fees that exceed the presumptively reasonable annual rate of \$270 established as reasonable by the Commission’s extensive review and findings and as set forth in the *TRO*. Additionally, ExteNet requests that the Commission create a “deemed granted” remedy based on the ample evidence

gathered during the *TRO* proceeding and now supplemented by the examples provided in this current proceeding.

Respectfully submitted,

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